Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

Petitioner,

vs.

MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

PETITIONER'S REPLY BRIEF

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Pursuant to rule 24 of the Supreme Court Rules, this reply brief of petitioner is filed.

I.

The Seventh Circuit wrongly decided this case because under any recognized standard of care, either pre-1972 or post-1972, the jury's verdict for the plaintiff was supported by the evidence, and should have been affirmed on appeal. To allow the opinion of the Seventh

Circuit to stand would be to tolerate an appellate court's upsetting jury verdicts when the issue of "open and obvious danger" is a question of fact, decided by the jury, and the court of appeals supplanting its conclusion for the jury's.

Here, the case was submitted to the jury on an agreed instruction consistent with negligence principles under the well-recognized exception to the open and obvious danger standard contained in § 343A of the Restatement of Torts, 2d. The jury resolved the question for the plaintiff in its verdict. The court of appeals redecided the case saying there was *no* negligence at all. This it cannot do. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108.

II.

This decision is in direct conflict with the case of *Bachtel v. Mammouth Bulk Carriers, Ltd.*, [petition for certiorari filed, case No. 79-538]. Respondent's argument [Brief in Opposition, p. 5] that in *Bachtel* and *Santos* [79-512] the Ninth Circuit characterized the vessel's obligation as one of protecting longshoremen from unreasonable risk of harm begs the question in this case. The jury found from hearing all the evidence in the five-day trial that the respondent was negligent, but the panel of the Seventh Circuit did not include all the facts in its opinion and substituted its opinion for the jury's, notwithstanding the fact that the § 343A instruction to the jury contained a charge asking them to find and "determine whether the shipowner (a) knew or by the existence [sic] of ordinary care should have known of the condition, and should have realized that it involved an unreasonable risk of harm to longshoremen, and (b)

should have expected that the longshoremen would not discover or realize the danger, or would be able to avoid the danger, even though they may be aware of it, and (c) whether the shipowner failed to exercise ordinary care to protect them against the danger." [Tr. p. 665]

Under similar facts and circumstances, and a definition of negligence similar to that used in this case, the Ninth Circuit affirmed the jury's verdict that the vessel's negligence in failing to rig a safety line was the proximate cause of the plaintiff's injuries.

Respondent's citing *Long v. Silver Line, Ltd.*, *Miller v. The Sultana* and *Ove Tysko v. Royal Mail Steam Packet Co.* are no longer apropos of this case, as these were longshoremen cases decided at a time when the warranty of seaworthiness was available to a longshoreman currently with his negligence remedy. [Brief in opp., n. 7].

III.

Most importantly, as the Ninth Circuit pointed out in *Bachtel*, Title 29 C.F.R. § 1918.2 makes crystal clear that the OSHA regulations apply to "employers" and not to vessel owners, yet they *do not relieve owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

The Seventh Circuit, without checking the trial record carefully, obviously had in mind that the custom of rigging the safety net or rope or line around the open deep tank was peculiar to Chicago, when the trial record is devoid of such evidence, and in fact the contention was not even raised by respondent until its post-trial motion was filed.

Respondent's attorney failed to make any objection during the trial to petitioner's evidence that the custom was anything other than an industry-wide custom, used throughout the maritime industry. Federal Rule of Evidence 103(a)(1) could not be more specific that error may not be predicated upon a ruling unless "a timely objection or motion to strike appears *of record*, stating the specific ground of objection, if the specific ground was not apparent from the context." Respondent's failure to object constituted a waiver of any objection that the custom was anything except an industry-wide one, and not peculiar or unique to Chicago.

The panel reasoned that because there was no evidence that the crew knew of the custom, they could not be charged with negligence. Clearly, the Seventh Circuit, which had not heard a longshoreman's negligence case in about 10 years, until it heard this one, was confusing the law of custom in tort with that of contract.

Whether the crew knew of the custom would not make a difference, since proof of custom and usage is used in tort law to show standards of conduct, and the jury decides what constitutes negligence in a particular case.

CONCLUSION

The petition should be granted. Summary disposition is suggested in this case, by reversing the judgment of the Seventh Circuit at the same time as granting the writ.

Respectfully submitted,

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